United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-1502

To be argued by
RICHARD APPLEBY

B/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1502

UNITED STATES OF AMERICA,

Appellee,

—*against*—

REUBEN PARRAS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Preliminary Statement

Reuben Dario Parras appeals from a judgment entered on October 22, 1976, in the United States District Court for the Eastern District of New York (Dooling, *J.*), convicting him, following a jury trial, of distributing approximately twelve ounces of cocaine, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2. Appellant, an illegal alien, received a three year term of imprisonment and is incarcerated pending appeal.[1]

On appeal, appellant contends that Judge Dooling committed three reversible errors. First, he argues that

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[1] Co-defendant Yolanda Bolanos pled guilty to Count One of the indictment and received a sentence of 1 year and 1 day. Bolanos testified for neither side, and the court charged that she was unavailable to both sides (261).

certain statements by Yolanda Bolanos were improperly admitted in evidence against him under the co-conspirator exception to the hearsay rule. Second, he asserts that it was error for the trial judge to allow Margarita Mensa, a Spanish interpreter, to testify as to a voice identification of him. And finally, he alleges that the court improperly admitted certain post-arrest false exculpatory statements which he made on May 17, 1976.

Statement of Facts

Angel Rodriguez, an undercover detective with the New York City Police Department assigned to the New York Joint Task Force of the Drug Enforcement Administration ("DEA"), purchased an ounce of cocaine from Yolanda Bolanos on March 15, 1976. Following this purchase Bolanos agreed to sell to Rodriguez additional quantities of cocaine, and the two continued to keep in touch with each other (13).[2]

On April 7, 1976 at 10:15 P.M. Rodriguez telephoned Bolanos at her apartment on 81st Street in Queens. The conversation in Spanish was recorded and subsequently translated (Appellant's App. Item 4). Over the telephone, Rodriguez expressed an interest in meeting Bolanos' cocaine connection. After some initial reluctance, Bolanos dictated to Rodriguez the telephone number of her connection, a subsequent check with the telephone company revealing that one Livia Butron subscribed to that telephone number and that she resided on 83rd Street in Queens—just several blocks from Bolanos'

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[2] All references are to the trial transcript unless otherwise indicated.

apartment (115).[3] Just after Bolanos divulged the telephone number she told Rodriguez that she was leaving for her supplier's apartment, which was in the vicinity, and that she would telephone Rodriguez as soon as she arrived.

True to her word, fifteen minutes later, at 10:30 P.M., Bolanos telephoned Rodriguez. The conversation in Spanish was recorded and subsequently translated (Appellant's App. Item 5). Bolanos explained that she was now at her supplier's residence, but that there was a problem with the quality of the cocaine. She assured Rodriguez, however, that the deal sale could be consummated the next day, April 8. Bolanos told Rodriguez that her supplier was standing at her side and that he, Rodriguez, should speak to him directly (Appellant's App. Item 5).

At that point Rodriguez spoke to an individual, subsequently identified as appellant, about the forthcoming cocaine deal. Appellant—in the veiled language that narcotics dealers customarily employ—explained that the deal was off for that day (April 7) because the cocaine was of poor quality, but appellant told Rodriguez that the deal would take place the next day at approximately 3:00 P.M. When Rodriguez asked whether the price for the eight ounces remained at $8600, appellant returned the telephone receiver to Bolanos. Bolanos agreed that the price would remain the same. Bolanos and Rodriguez agreed to meet in Brooklyn the next day at 3:00 P.M. (35).

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[3] Livia Butron had initially agreed to testify against appellant and would have been the Government's principal witness. However, out of fear for her life, she refused to testify despite a grant of immunity from the Justice Department. In the midst of the trial she was sentenced to three months imprisonment for criminal contempt. Memorandum Decision, dated August 17, 1976; (see docket entries in appellant's appendix).

The next day, April 8, Rodriguez went to a prearranged location in Brooklyn to meet Bolanos. When Bolanos failed to appear, Rodriguez telephoned her. Bolanos apologized, explaining that her supplier could not get the cocaine ready that day "but that the deal would be done" (36). Arrangements were made for the following day.

On April 9 Bolanos telephoned Rodriguez and told him that the sale would take place that same day. Bolanos also said that she had acquired an additional four ounces of cocaine and that she now had a total of twelve ounces for sale. Rodriguez agreed to purchase the additional cocaine, and arrangements were made for the sale to take place at a Burger King restaurant in Queens (36-38).

That same day (April 9), at 4:50 P.M., Rodriguez and his partner, Detective Petraglia, met Bolanos at the Burger King, where it was agreed the narcotics sale would take place in the rear seat of the agent's automobile.

Inside the automobile, the detectives asked Bolanos if she could acquire additional cocaine from her supplier. Bolanos said that she would first have to talk to her supplier. Rodriguez asked Bolanos whether her connection was the same man he had talked to earlier on the telephone (on April 7). Bolanos said yes (38). At this time, in the rear seat of the automobile, Bolanos handed to Petraglia three separate plastic bags of cocaine, each containing four ounces (Gov't Exhibit 4). Bolanos was then placed under arrest (38).

Meanwhile, Frank Berberich of the Task Force interviewed Livia Butron, after determining from the telephone company that the "male voice" had used Livia

Butron's telephone when talking to Detective Rodriguez on April 7. (See footnote 3 *ante*; 103-104). As a result of the information derived from that interview, Berberich arrested appellant on May 17, 1976 (106). After arresting appellant on the street Sargeant Berberich recalled having observed appellant (during the course of a surveillance) on April 9 in the vicinity of Livia Butron's apartment house (117).

Appellant was then taken to the 108th Precinct. From there, Berberich telephoned Detective Rodriguez who was then stationed at the Task Force Office. Berberich put appellant on the telephone, and appellant and Rodriguez then conducted a conversation in Spanish (45-47). The telephone conversation was recorded but was not translated. (Judge Dooling instructed the jury to use that tape solely as a means of comparison with the April 7 recording (47)). After Rodriguez heard appellant's voice he immediately recognized it as the same person he had talked to on April 7 (45).

After his arrest, appellant made a number of incriminating statements. He gave the agents two different false names (109). He denied knowing Livia Butron (115). He then changed his story and admitted knowing her but denied having ever been in her apartment. (115). Appellant denied knowing Yolanda Bolanos (115). In an apparent effort to explain the taped conversation of April 7 (in which he used the word "clothes" to refer to the cocaine), appellant stated he was a clothes merchant. However, he could neither specify where he bought the clothes nor identify any of his customers (116).

Margarita Mensa, a Spanish interpreter and translator, was the Government's third and final witness. After having conducted a hearing out of the presence of

the jury, Judge Dooling determined that Mrs. Mensa was qualified to make a comparison between the voice exemplar of appellant taken after his arrest and the April 7 tape (162-163). Mrs. Mensa testified to her exceptional training, education and background in the translation of foreign languages, including Spanish, her native tongue. She testified that she was familiar with the different dialects of Spanish speaking people (173). On the basis of her expertise and after listening to the tapes "many times", she was certain that the male on the known exemplar was the same as that on the April 7 conversation. She found several words that were repeated in the two conversations which "sounded to me like exactly the same intonations; exactly the same" (179). Furthermore, she found the inflection, modulation and tone of the two voices to be the same (180).

The defense did not present any witnesses. The jury convicted appellant after deliberating approximately one hour.

ARGUMENT

POINT I

Appellant's Participation In The Conspiracy Was Established By A Fair Preponderance Of Non-Hearsay Evidence, So That Hearsay Statements Of Co-Conspirator Yolanda Bolanos Were Properly Admitted In Evidence.

Appellant argues that the trial court improperly admitted in evidence, through the testimony of Detective Rodriguez, hearsay statements of co-conspirator Yolanda Bolanos. Appellant bases this argument on the contention that there was insufficient non-hearsay evidence link-

ing appellant to the April 9 conspiracy to support the charge in the indictment.[4]

It is a well-recognized exception to the hearsay rule that the declarations of one conspirator may be used against another conspirator not present if the declarations were made during the course of and in furtherance of the conspiracy.. *Lutwack* v. *United States*, 344 U.S. 604, 617, *reh. denied*, 345 U.S. 919 (1953). Such hearsay evidence may only be admitted against a defendant, however, where there is independent non-hearsay evidence of the existence of the conspiracy and the defendant's participation therein. *Glasser* v. *United States*, 315 U.S. 60, 74 (1942). The Second Circuit has adopted the rule that in order for hearsay evidence to be admitted under the co-conspirator exception the defendant's participation in the conspiracy must be established by a "fair preponderance" of independent non-hearsay evidence. *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied sub. nom. Lynch* v. *United States*, 397 U.S. 1028 (1970). In this case, there was more than the required non-hearsay evidence.

First, there were the coded admissions made by appellant in the recorded April 7 conversation with Detective Rodriguez. Indeed, these statements were indisputably made during the course of the alleged conspiracy and were sufficient to establish appellant's guilt even without corroboration. *United States* v. *Head*, Docket No. 76-1249, slip op. 647, 643 (2d Cir. Decided Novem-

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[4] The Government charged appellant with "aiding and abetting" the April 9 transaction. However, it is settled that if the Government *proves* a conspiracy, without actually charging the defendant under the conspiracy statute, the co-conspirator exception ot the hearsay rule nevertheless applies. *United States* v. *Richardson*, 477 F.2d 1280 (2d Cir.), *cert. denied*, 414 U.S. 843 (1973).

ber 29, 1976). In that recording appellant evidences his complete familiarity with the narcotics activities of his co-conspirator, Yolanda Bolanos, and his desire to bring about the forthcoming cocaine deal. Thus, the April 7 conversation by itself easily meets the *Geaney* test.

However, other than the recording, there was additional corroboration linking appellant to the April 9 cocaine deal. First, Sargeant Berberich testified that he observed appellant in the vicinity of Livia Butron's apartment on the night of April 9. (It will be recalled that appellant used Butron's telephone in the April 7 conversation.) Second, there were appellant's incriminating post-arrest statements. Appellant admitted knowing Livia Butron, after having denied knowing her initially. Appellant falsely claimed that he had never been in Butron's apartment and that he did not know Yolanda Bolanos. He also gave the agents several fictitious names at the time of his arrest.[5] The judge was permitted, in making his determination as to the sufficiency of the independent evidence, to draw such inferences as the established facts permit. *United States* v. *Manfredi*, 488 F.2d 588 (2d Cir. 1973). From appellant's admissions on the April 7 tape—just two days prior to the delivery (cf. *United States* v. *Stanchich*, Docket No. 76-1407, slip op. 1277, 1287-1288 (2d Cir. Decided January 6, 1977), from his presence in the vincinity of Livia Butron's apartment on April 9, and

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[5] The false exculpatory statements were probative of a consciousness of guilt. *United States* v. *Parness*, 503 F.2d 430, 438 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). Appellant argues (Br. p. 20), as he did to the jury, that these statements may have been made to hide his status as an illegal alien. The resolution of this issue was for the jury. *United States* v. *Geaney*, *supra*, 417 F.2d 1121; *United States* v. *Ragland*, 375 F.2d 471, 472 (2d Cir. 1967), *cert. denied*, 390 U.S. 725 (1968).

from his post-arrest admissions and false exculpatory statements, the trial court could have reasonably inferred that appellant was a party to the conspiracy to distribute the cocaine on April 9. Accordingly, the hearsay statements of Yolanda Bolanos (e.g. her statement on April 9 at the Burger King Restaurant to the effect that the cocaine emanated from the same man Detective Rodriguez had spoken to over the telephone on April 7) were properly admitted against appellant.[6]

Relying on *Dutton* v. *Evans*, 400 U.S. 74 (1970) and *United States* v. *Puco*, 476 F.2d 1099, *petition for rehearing en banc denied*, 476 F.2d 1106 (2d Cir.), *cert. denied*, 414 U.S. 844 (1973), appellant also asserts that it was reversible error for the trial court to admit the hearsay declarations of Yolanda Bolanos because these statements were crucial to the Government's case and do not bear sufficient indicia of reliability. The first part of this argument was foreclosed by the *Puco* panel when it decided that the trial judge need not make any determination as to whether a particular hearsay statement is "crucial" or "devastating" to the defense. *United States* v. *Puco*, 476 F.2d at 1107.

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[6] Clearly, the fact that there was a one day delay in the cocaine deal does not prove, contrary to appellant's assertion, that the April 7 telephone conversation referred to a separate conspiracy. In the April 7 conversation appellant stated to Detective Rodriguez that there was a problem with respect to the quality of the cocaine and, hence, the reason for the adjournment of the deal to April 8. Construing the evidence in the light most favorable to the Government, *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972), the jury could have inferred that the delay from April 8 to April 9 was caused by similar problems. In any event, whether the April 7 conversation referred to a separate (or aborted) conspiracy was a jury question. *United States* v. *Armedo-Sarmiento*, Docket No. 76-1113, slip op. 305, 309 (2d Cir., Decided October 28, 1976).

Appellant's second argument, that Bolanos' statements do not bear sufficient indicia of reliability, is totally unsupported by the facts of the case. In the first place, as discussed above, a conspiracy was clearly established, both by the acts of Bolanos and by the cocaine seized from her, as well as by appellant's own admissions on the April 7 tape and his presence in the vicinity of Butron's apartment. Bolanos' statements when she was negotiating with Rodriguez "were not only in furtherance of the conspiracy . . . but . . . were also against her own penal interest." *United States* v. *D'Amato*, 493 F.2d 359, 365 (2d Cir. 1974) (and cases cited therein). Finally, the Court in *Dutton* recognized that the federal co-conspirator exception to the hearsay rule does not violate any constitutional mandate. *Dutton* v. *Evans*, 400 U.S. at 81.[7]

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[7] Appellant complains that it was error for Judge Dooling to permit Detective Rodriguez to testify that the so-called "crucial" hearsay statement of Yolanda Bolanos on April 9, in which she attributes the source of the cocaine to appellant, was made before she delivered the cocaine to the detectives and not after the delivery. The argument is frivolous. Whether the statement was made before, contemporaneously with, or after, the delivery, the statement was still in furtherance of the conspiracy. Bolanos was obviously trying to impress her customers with her connection and to induce further transactions. Moreover, appellant greatly exaggerates the importance of the hearsay statement. The link between the April 7 telephone conversation between Detective Rodriguez and appellant and the April 9 transaction was established by the conversation itself, the proximity in time between the two events and other corroborative evidence (see page 8, *supra*). Under the circumstances, the hearsay statement was superfluous.

POINT II

It Was Not Error For Judge Dooling To Permit Mrs. Mensa To Testify To The Voice Identification.

Appellant contends that Judge Dooling caused reversible error by permitting Margarita Mensa, a Spanish interpreter, to testify to a voice identification which she made after comparing the male voice on the April 7 telephone conversation with the known voice exemplar of appellant which was taken after his arrest. This argument is foreclosed by this Court's decision in *United States* v. *Armedo-Sarmiento*, *supra*, slip op. 305, 314 (2d Cir. Decided October 28, 1976). In that case an interpreter was also asked to compare an unidentified voice on a tape recording with voice samples of the defendant. This Court held that it was not improper for the district court to permit the identification despite the fact that, as here, the interpreter had never had personal contact with the defendant. See also Fed. R. of Evidence, Rule 901(b)(5); Weinstein, *Evidence*, Vol. 5 § 901-61. It should be noted that Judge Dooling carefully instructed the jury as to the purpose of this testimony and its limited nature (177-178). Furthermore, he told counsel that he would grant him a continuance of two days should he wish to introduce contradictory evidence (129). Counsel never took up the offer, although he had at his side a qualified Spanish interpreter (Albert Barron-Boyne) interpreting for his client during the trial.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: February 2, 1977
Brooklyn, New York

Respectfully submitted,

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COUNTY OF KINGS
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Joanne Bracco being duly sworn,

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That on the 3rd day of February 19 77 he served a copy of the within

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Joanne Bracco

Sworn to before me this
3rd day of February 19 77

Carolyn N. Johnson

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Term expires March 30, 1977